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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 444

CITY OF ERLANGER, KENTUCKY,

Petitioner,

v.

RAYMOND J. BERKEMEYER, THE WEIL, ROTH & IRVING COMPANY, JOHN D. EXTERKAMP,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Brief for Respondents, Raymond J. Berkemeyer and The Weil, Roth & Irving Company, in Opposition

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I. OPINIONS BELOW

The opinion of the District Court (as given from the bench—R. 436-466) is not reported. The opinion of the United States Court of Appeals for the Sixth Circuit (R. 497-508) is reported in 204 F. (2d) 567.* That Court's citations given in connection with the order denying the petitions for rehearing (R. 563) are not reported.

II. JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

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* Advance sheets only; deleted from bound volume.

III. STATEMENT OF THE CASE

Petitioner, in its Statement of the Case, would lead the Court to believe that many of its contentions were found to be facts by the Trial Court and upheld by the Court of Appeals. Nothing could be further from the truth.

The paragraph numbered "3" and following paragraphs of Petitioner's Statement (p. 10) refer to a "false and fabricated" resolution authorizing the delivery of the bonds (though admittedly a resolution authorizing the bond issue was adopted). On the contrary, the District Court found that this "delivery" resolution was and is a resolution of the Town (now City) of Erlanger and that the "record of this resolution . . . has in some unexplained manner disappeared from the records . . ." (Findings of Fact, Par. 7, R. 476-7).

Moreover, the Court found that certified copies of the entire proceedings relating to the bonds were delivered to this law firm, Peck, Shaffer & Williams, "for the purpose of obtaining of that firm its legal opinion as to the validity of the bonds" (Findings of Fact, Par. 9, R. 477). Contrary to Petitioner's assertion (p. 11) that the record does not disclose when Peck, Shaffer & Williams received those copies, at page 154 thereof it was testified that Mr. Victor, the Town Attorney, delivered them for the purpose of obtaining the validity opinion.

Quite obviously Petitioner wishes this Court to weigh the evidence. However, the District Court has carefully considered the matter and we refer the Court not only to its opinion delivered from the bench (R. 436-466) but also to its Findings of Fact (R. 472-480) and Conclusions of Law (R. 480-482) as they relate to these respondents.

The Court of Appeals also wrote a detailed opinion (R. 497-508) which affirmed the judgment of the District Court in all but one respect. That exception was that the record of the resolution authorizing delivery of the bonds was

held to be inadmissible (R. 500). The Court's reasoning was that since the record for that day was available, it could not be supplemented under the "best evidence rule." Thus the Court of Appeals accepted the District Court's finding that the missing record had disappeared but defeated its admission into evidence on a technicality—the best evidence rule. We did and do not believe that the law is, as stated in effect by the Court of Appeals, that, if a municipality's record of proceedings for a given day are *wholly* destroyed, secondary proof thereof may be introduced, but if it is only *partially* destroyed, no such secondary proof may be made. Accordingly, we filed a petition for rehearing, which the Court of Appeals overruled without opinion. Since a correct basis for a reduced judgment still remains and since our claimed error rests on a wholly isolated misconstruction of local law, we did not petition for a writ of certiorari. We submit that Petitioner's contention is of a similarly isolated nature, with the added and insurmountable barrier that it is wrong as to its interpretation of the local law.

IV. THE QUESTION PRESENTED

The question presented is whether, assuming no valid original delivery by the Town (now City) of Erlanger, these Respondents have the rights of the Bank of Fort Thomas which was a holder in due course. The enabling statutes for these bonds provided that they would have "all the qualities of negotiable instruments under the law merchant" (Sec. 5 of Chap. 92 of the Acts of Kentucky of 1930) and termed them "negotiable bonds" (Sec. 2 of Chap. 81 of the Acts of Kentucky of 1936). If sections 16 and 58 of the Negotiable Instruments Law of Kentucky (pp. 218 and 225 of the Acts of Kentucky of 1904) apply, as the District Court and the Court of Appeals held, clearly the judgment is correct. Section 16 provides that "Where an

instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed." Section 58 is to the effect that "a holder who derives his title through a holder in due course . . . has all the rights of such former holder in respect of all parties prior to the latter."

V. SUMMARY

Petitioner has submitted two contentions: First, that the "NIL" does not apply to the bonds sued on according to Kentucky law; and second, that the proceeding should be stayed pending a determination by Kentucky courts as to the application of the NIL to the facts herein. We shall demonstrate that under Kentucky law the NIL does apply to these bonds and that the Court of Appeals below has decided the question of local law exactly in accordance with local decisions. Thus, it is unnecessary to reach the second contention.

VI. ARGUMENT

Clearly Petitioner's two contentions are inconsistent with each other. If Kentucky law is as clear as it argues, then there is no need to stay proceedings to let Kentucky courts repronounce that same law.[1]

However, the fact is that Kentucky law is clear on the question but contrary to that argued for by Petitioner. Kentucky law is that the NIL in Kentucky provides the same rules as the law merchant.

The NIL, as its beginning is described in *Gannon* v. *Bronston*, 246 Ky. 612, 55 S. W. (2d) 358, did not seek to alter the common law or law merchant except to meet the

[1] It is perhaps a sufficient comment that, assuming the incorrectness of the Court of Appeals' construction of Kentucky law, the decision is of no importance to other litigants throughout the country. We do not believe that it is necessary for this Court to spell out *Erie* v. *Tompkins* in unimportant and unrepresentative cases.

exigencies of conflicting rules in various jurisdictions. At page 364 (S. W.) the Court stated:

> "These opinions show that *this court regards the Negotiable Instruments Law, not as something new or revolutionary, but rather as a codification, a compilation, or a restatement of the law as it was.*" (Italics added.)

At page 365 it stated:

> "By section 3720b-195, Ky. Stats., all laws inconsistent with the Negotiable Instruments Law are repealed. That not only repeals such statutes, but also destroys the force of inconsistent judicial opinions. . . ."[2]

Thus, the reference in Section 5 of Chapter 92 of the Acts of 1930 to "negotiable instruments under the law merchant" and the reference in Section 2 of Chapter 81 of the Acts of 1936 (page 245) to "negotiable bonds" is clearly to such as codified under the NIL. Indeed, if Kentucky law prior to the enactment of the NIL was contrary to said Sections 16 and 58 thereof, clearly that law was repealed thereby. Indeed, the Legislature cannot re-enact by reference something that has once been repealed.

Petitioner questions the application of any of the provisions of the NIL to these bonds. However, just as the legislature is competent to enact an NIL covering certain types of instruments, so too it is competent to class other instruments as negotiable with all the attendant consequences.

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[2] Significantly, by Section 195 of the NIL (page 252 the Acts of Kentucky of 1904) "all laws inconsistent with this act are hereby repealed." Of equal importance is the fact that the so-called "Uniform Act" contained "Section 196 (cases not provided for in Act). In any case not provided for in this act the rules of the law merchant shall govern"; this provision was not included in the Kentucky Act.

Indeed, it would surely be an anomalous situation to have both the NIL and the law merchant currently give two different results as to municipal bonds that were otherwise similar. If this were so, as stated in *City of Newport Richey* v. *Fidelity and Deposit Company*, 105 F. (2d) 348 at 350,

> ". . . the negotiability of commercial paper would be greatly hindered, since in every case one would need to inquire about delivery by the maker and by each indorser before he could be safe. . . ."

Petitioner's only Kentucky authority in answer to *Gannon* v. *Bronston*, supra, and the other cases cited by the Court of Appeals, is not a Kentucky judicial decision, as suggested by subdivision 5(b) of Rule 38 of this Court, but a footnote in a treatise prepared in 1904 by a Charles M. Lindsay of the Louisville bar. A description of Sec. 16 is quoted therefrom (Petition p. 22) ending with an opinion that this "provision has radically changed the law." However, authority (which was omitted by Petitioner) for this statement is not Kentucky law but several then current treatises on bills and notes. One of these, Eaton and Gilbert on Commercial Paper, recites at page 260:

> "As a general rule possession of a promissory note or bill of exchange implies delivery. According to the preponderance of authority, one who has purchased for value in good faith, in the usual course of business, and before maturity, a negotiable instrument complete upon its face, and not voided by forgery or statutory prohibition, has good title in the person from whom he took it, even though such person may have acquired it by fraud, by theft, or by robbery. *The rule as declared in the Negotiable Instruments Law is clearly that of the law merchant*; . . ." (Italics added.)

Thus, Petitioner's own authority does not stand close examination.

Since the Court of Appeals has decided this question of local law exactly in accordance with local decisions, subdivision 5(b) of Rule 38 indicates that the writ should be denied.

VII. CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

Frank H. Shaffer Jr.

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November 23, 1953